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SUPREME COURT, U.S.

In The
Supreme Court of the United States

M.M., BY AND THROUGH HER PARENT, L.R.,

Petitioners,

v.

SPECIAL SCHOOL DISTRICT NO. 1, MINNEAPOLIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE STATE OF MINNESOTA IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is submitted by the State of Minnesota in support of the Petition for Writ of Certiorari filed by M.M., by and through her parent, L.R.[1] In 2005, this Court expressly declined to decide whether States themselves may assign the burden of proof in special education administrative hearings. *Schaffer v. Weast*, 546 U.S. 49, 61 (2005). The Eighth Circuit erroneously held that *Schaffer* requires the burden of proof to be always placed on the party seeking relief, notwithstanding any State law reallocating the burden. *M.M. v. Special Sch. Dist. No. 1,* 512 F.3d 455, 458-59 (8th Cir. 2008), *citing Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett,* 440 F.3d 1007, 1010 n. 3 (8th Cir. 2006).

The State of Minnesota has a compelling interest in this case because the Eighth Circuit, in effect, held that an important state statute (codifying a 30-year state rule) is preempted without any analysis. Minnesota respectfully requests that this Court grant the Petition for Writ of Certiorari because the Eighth Circuit's decision contradicts the federal Individuals with Disabilities Education Act and this Court's precedents holding that the federal special education law "leaves to the States the primary responsibility for developing and executing educational programs"

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[1] As required under Sup. Ct. R. 37.2(a), counsel of record received notice at least ten days prior to the due date of the State's intention to file this *amicus curiae* brief.

for children with disabilities. *Bd. of Educ. of Hendrick Hudson Central Sch. Dist., Westchester Cty. v. Rowley,* 458 U.S. 176, 183 (1982). If allowed to stand, the Eighth Circuit's decision could have a detrimental effect on the longstanding "cooperative federalism" between the States and the federal government in providing educational services to children with disabilities.

SUMMARY OF ARGUMENT

Three years ago, several States urged this Court in *Schaffer v. Weast*, 546 U.S. 49 (2005), to decide whether States may, if they wish, override the burden of proof default rule, and place the burden of persuasion in special education due process hearings on school districts. The Court expressly acknowledged the States' request, *Schaffer,* 546 U.S. at 61, but held that because the State in question in *Schaffer* (Maryland) had no such law or regulation assigning burden of proof, the Court need not decide the issue that day. *Id.* This issue now squarely arises here, for the Eighth Circuit refused to even consider Minnesota's statute that expressly assigns the burden of proof in due process hearings to school districts. Granting the petition presents the opportunity for the Court to squarely address this issue that has significant implications for the model of "cooperative federalism" under the federal Individuals with Disabilities Education Act.

ARGUMENT

M.M.'s petition for writ of certiorari should be granted for three reasons. First, the Eighth Circuit's decision is contrary to Congress's mandate that participating States set forth standards and procedures for the education of students with disabilities consistent with federal law. Second, the Eighth Circuit's decision has broad national implications for the role of the States in overseeing and establishing policies and procedures under the federal special education law. Third, the Eighth Circuit erred in holding a state statute is preempted without giving notice to the State's Attorney General as required by federal statute and court rule.

I. The Eighth Circuit's Decision Is Contrary To The Individuals With Disabilities Education Act And This Courts' Precedents.

A. IDEA Statutory Framework and Minnesota Law.

The State of Minnesota has voluntarily chosen to receive federal funds under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA" or "Act"). Consistent with the IDEA, the State – through its local school districts created by the State and ultimately responsible to the State – is to provide a "Free Appropriate Public Education" for children with disabilities. 20 U.S.C. § 1412. Because every child with a disability has different needs, school districts, in consultation with the disabled

child's parents, must develop an Individualized Education Program ("IEP") for each child. 20 U.S.C. § 1412(a)(4). In most instances, the parents and school district agree on the content of the IEP. However, on occasion, the parents and the school district do not agree. In those instances, either the parents or the school district may seek an "impartial due process hearing." 20 U.S.C. § 1415(f)(1)(A).

The IDEA is silent on which party bears the burden of proof for these administrative special education hearings. *Schaffer v. Weast*, 546 U.S. 49, 51 (2005). Since the IDEA is silent, the Court held that the burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Id.* at 58. The Court expressly declined to address the issue of whether States may, if they wish, override the default rule because the state in question (Maryland) had no such law or regulation. *Id.* at 61. As this Court stated: "we hold no more than we must to resolve the case at hand." *Id.* at 62. The issue now squarely arises here because Minnesota has a thirty-year old procedure – now in state statute – that expressly places the burden of proof on school districts in these hearings.

In 1977, shortly after the statutory precursor to the IDEA was passed,[2] the Minnesota State Board of Education adopted state rules that set forth various

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[2] Education for All Handicapped Children Act of 1975, 89 Stat. 773.

procedural requirements for administrative special education hearings, including placing the burden of proof on school districts. *See,* Minnesota EDU 129 (1977), 5 MCAR § 1.0129(F)(2) (1980 through 1983) ("The school district(s) shall bear the burden of proof as to all facts and as to grounds for the proposed action."), and Minn. Rules 3525.4300 (1983 through 2003). In 2003, the Minnesota Legislature incorporated the burden of proof provision into statute. 2003 Minn. Laws, 1st Sp. Sess. Ch. 9, Art. 3, § 9. Minnesota law currently states:

> **Burden of Proof.** The burden of proof at a due process hearing is on the district to demonstrate, by a preponderance of the evidence, that it is complying with the law and offered or provided a free appropriate public education to the child in the least restrictive environment. If the district has not offered or provided a free appropriate public education in the least restrictive environment and the parent wants the district to pay for a private placement, the burden of proof is on the parent to demonstrate, by a preponderance of the evidence, that the private placement is appropriate.

Minn. Stat. § 125A.091, subd. 16 (2006).

B. The Eighth Circuit's Decision Is Contrary to the IDEA.

Although education is not a *federal* fundamental right, *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411

U.S. 1, 37 (1973), every state constitution has a provision mandating, at a minimum, that the State provide a system of free public schools.[3] Most, if not all, of the States have a state constitutional duty to provide a free quality education to all children – including those with disabilities – in the State.

In the discharge of this duty to provide a quality education to all children, the States typically make general policy, but delegate much of the responsibility to the local school districts. Russo, Charles J., *The Law of Public Education,* 138 (5th ed. 2004). The States remain responsible for assuring that the state constitutional mandate is met. *Id.* at 141 ("Delegation

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[3] *See* Ala. Const. art. 14, § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 5; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § VII, para. 1; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, § 3; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, § 1; Me. Const. art. 8, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5; Mich. Const. art. VIII, § 2; Minn. Const. art. XIII, § 1; Miss. Const. art. VIII, § 201; Mo. Const. art. 9, § 1(a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 2; N.H. Const. pt. 2, art. 83; N.J. Const. art. VIII, § 4; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VII, § 1; Ohio Const. art. VI, § 3; Okla. Const. art. XIII, § 1; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; S.D. Const. art. VIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. 2, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 1; W.Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art. VII, § 1.

aside, legislatures cannot avoid their constitutional responsibilities by act of delegation to local authorities.").

Congress established the same framework in the IDEA, requiring participating States to certify to the Federal Government that they have "policies and procedures" that will ensure that they are meeting the Act's conditions. 20 U.S.C. § 1412(a). The purpose of the IDEA is:

> to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.

20 U.S.C. § 1400(d)(1)(A). The education of children with disabilities must, among other things, "meet the standards of the state educational agency." 20 U.S.C. § 1401(9)(B); *Winkelman v. Parma City Sch. Dist.*, 127 S.Ct. 1994, 2001 (2007).

Congress requires States to "establish and maintain procedures" to ensure that children with disabilities and their parents are "guaranteed procedural safeguards." 20 U.S.C. § 1415(a). *Schaffer*, 546 U.S. at 54. Specific to due process administrative hearings, the IDEA provides that parents or local school districts have the opportunity for an impartial due process hearing "as determined by State law or by the State educational agency":

> Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, *as determined by State law or by the State educational agency.*

20 U.S.C. § 1415(f)(1)(A) (emphasis added). Federal Courts of Appeals have held that this provision authorizes States to establish hearing procedures where the IDEA is silent. *Z.A. v. San Bruno Park Sch. Dist.*, 165 F.3d 1273, 1275 (9th Cir. 1999) (holding that this provision authorizes California to prescribe due process hearing rights). Various States' hearing procedures have been upheld pursuant to this authorization, including whether non-licensed attorneys may receive attorney fees, *id.*, establishing a time limit for bringing hearings,[4] *C.M. v. Bd. of Educ.*, 241 F.3d 374 (4th Cir.), *cert. denied,* 534 U.S. 818 (2001); and establishing proper parties in due process hearings, *Johnson v. Indep. Sch. Dist. No. 4,* 921 F.2d 1022, 1031 (10th Cir. 1990), *cert. denied,* 500 U.S. 905 (1991).

The legislative policy determination to direct local school districts to bear the burden of proof in administrative hearings is not only authorized by the

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[4] The IDEA now provides a timeline for requesting hearing. 20 U.S.C. § 1415(f)(3)(C).

IDEA, but consistent with the constitutional reality that local school districts "have only such power and authority they are granted by their state legislatures." Russo, *supra,* at 138. Each State has plenary authority over its local public schools to define their powers and duties. *Casey K. ex rel. Norman K. v. St. Anne Community High School Dist. No. 302*, 400 F.3d 508, 512 (7th Cir.), *cert. denied,* 546 U.S. 821 (2005); *State Bd. of Educ. of City of Minneapolis v. Erickson,* 190 Minn. 216, 222, 251 N.W. 519, 521 (1933). Because all States have the plenary power to create school districts and to define their powers and duties, there is no federal limitation that precludes an exercise of the States' authority to require that school districts be accountable and prepared to justify their educational decisions when challenged.

C. The Eighth Circuit's Decision Is Contrary To This Court's Precedents.

This Court and the circuit courts have long recognized and upheld the States' key role in setting forth policy and procedures for the education of children with disabilities. In its seminal decision on special education, this Court stated:

> [T]he Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility.

Board of Educ. of Hendrick Hudson Central Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 183 (1982). *See also, Schaffer,* 546 U.S. at 52. The *Rowley* decision added:

> [T]he statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child.

Rowley, 458 U.S. at 189 (emphasis in original). In sum, as this Court aptly describes in its very decision giving rise to the present controversy: "IDEA is frequently described as a model of 'cooperative federalism.'" *Schaffer,* 546 U.S. at 52 (citations omitted).

The IDEA, therefore, consists of "skeletal federal provisions designed as minimum standards" for the education of children with disabilities. *Town of Burlington v. Department of Educ.,* 736 F.2d 773, 785 (1st Cir. 1984), *aff'd sub nom.,* 471 U.S. 359 (1985). As the First Circuit explained:

> It seems plain that the Congress drew the procedural and substantive contours of education for disabled children, but left the shading and tinting of the details largely to the states. States are responsible for filling in the numerous interstices within the federal Act through their own statutes and regulations. Congress provided for federal executive oversight through states' annual

> plans to assure basic compliance with the federal minimum standards but the states supply the machinery necessary to effectuate the guarantees provided by the federal Act on a daily basis

Id.[5] Congress made clear it did not intend that the IDEA would preempt and reduce all state standards to the federal minimum. *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 419 (1st Cir. 1985), *cert. denied,* 475 U.S. 1140 (1986). Accordingly, when a State provides for educational benefits exceeding the minimum federal standards set forth under *Rowley*, the state standards are enforceable through the IDEA. *C.J.N. by S.K.N. v. Minneapolis Pub. Sch.*, 323 F.3d 630, 639 (8th Cir.), *cert. denied,* 540 U.S. 984 (2003), *quoting Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999).

Moreover, under the IDEA, States are ultimately responsible for the local school districts' provision of special education services. 20 U.S.C. § 1412(a)(11)(A); *John T. v. Iowa Dept. of Educ.*, 258 F.3d 860, 865 (8th Cir. 2001). If a local school district fails to establish or maintain programs of free appropriate public education, the state educational agency itself must provide

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[5] The *Burlington* decision further cited Senator Stafford's explanation in the introduction of the precursor of IDEA to the Senate Conference Committee: "Make no mistake, educating our children is still very much a State responsibility, and this bill does not change that." 121 Cong. Rec. 37411 (Nov. 19, 1975). *Town of Burlington*, 736 F.2d at 785, n.11.

the services, 20 U.S.C. § 1413(g)(1), and/or may reduce funding to the offending school district until the State is satisfied that the local agency is complying with the IDEA. 20 U.S.C. § 1413(d)(1). Therefore, when parents challenge school districts' educational decisions in administrative hearings, it is a reasonable exercise of the State's oversight responsibility to hold districts accountable and ensure to the State, by the preponderance of the evidence, that they are complying with the law and offered or provided a free appropriate public education to the child.

Some school districts complain about the wisdom of the Minnesota state statute allocating the burden of proof in special education hearings. Since Minnesota's hearing procedure is squarely within the States' statutory oversight authority, concerns about procedural policies should be directed to the Minnesota Legislature to change that procedure. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 370 (1997).

States indisputably have the role and obligation to ensure that local school districts are complying with the IDEA. Part of that oversight is to ensure that local school districts are accountable for their educational services, placement and IEP decisions for children with disabilities. When parents and educators disagree about the appropriate educational services for a child, it is reasonable for the State, as part of its oversight responsibilities, to require the local school district to explain to the State – the party ultimately responsible – why the district's proposed

program complies with the IDEA. The requirement that school district officials establish the appropriateness of their recommendation is not only proper in the IDEA context, it is sound public policy that promotes public government accountability to its citizens. In short, the State's allocation of the burden of proof to school districts in special education hearings provides greater assurance that the States' obligations under the IDEA are being fully met.

In sum, because the State is responsible to the Federal Government for compliance with the IDEA, it has an interest in ensuring that local school districts are accountable for their educational services and IEP program decisions for children with disabilities. Therefore, Minnesota's statute allocating the burden of proof for special education due process hearings is squarely within the scope of the States' authority and responsibility under the IDEA. The Eighth Circuit's decision is therefore, in error and contrary to the IDEA and well-established court precedents.

II. The Eighth Circuit's Decision Has Significant Nationwide Impact.

This case is of nationwide importance in the special education field. At least five states other than Minnesota have statutes or regulations that allocate the burden of proof in special education due process

hearings to school districts.[6] Granting the petition in this case will clarify the law with respect to the role and responsibility of the States. Granting review will also ensure consistency among the courts, as a Connecticut federal district court applied and upheld a Connecticut state regulation assigning the burden of proof to parents as consistent with *Schaffer*. *See P. ex rel. Mr. P. v. Newington Bd. of Educ.*, 512 F.Supp. 2d 89, 99 (D. Conn. 2007).

The Eighth Circuit's decision affects, not only the issue of State's assigning the burden of proof, but other state laws and regulations that provide for more rights or services beyond the minimal requirements of the IDEA. As discussed, while a State may not depart downward from the minimum mandated by federal law, "a State is free to exceed, both substantively and procedurally, the protection and services to be provided to its disabled children." *Burlington,* 736 F.2d at 792. Examples of recent litigation upholding States' substantive benefits that go beyond the IDEA include State behavioral interventions rules, *C.J.N. by S.K.N. v. Minneapolis Pub. Sch.*, 323 F.3d 630, 639 (8th Cir.) *cert. denied,* 540 U.S. 984 (2003); state law requiring additional transportation services for pre-school children, *Indep. Sch.*

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[6] New York, McKinney's Education Law § 4404, subd. 1c (2007); New Jersey, N.J. Stat. Ann. § 18A:46-1.1 (2008); Delaware, 14 Del. C. § 3140; Connecticut, Conn. Agencies Regs. § 10-76h-14(a); West Virginia, W.Va. Code St.R.T. 126, series 16, App. A. Ch. 11, § 3, A.

Dist. No. 709 v. Bonney, 705 N.W.2d 209, 215 (Minn. Ct. App. 2005); and state law requiring that students enrolled in nonpublic schools are entitled to receive special education services from the public schools. *Indep. Sch. Dist. No. 281 v. Minnesota Dept. of Educ.,* 743 N.W.2d 315, 324 (Minn. Ct. App. 2008).

If States' procedures – that fill in the silent gaps in the IDEA procedural safeguards – are considered to be preempted by the IDEA, then the issue arises whether States' substantive benefits beyond the federal minimal floor are also preempted by the IDEA. That critical issue should be addressed by this Court to reaffirm the long-standing description of the IDEA as a "model of cooperative federalism." *Schaffer,* 546 U.S. at 52. "Cooperative federalism" in the IDEA allows substantive differentiation among the States in the determination of which educational theories, practices, and additional procedures will be utilized for educating children with disabilities. *Burlington,* 736 F.2d at 784, *quoting Rowley* at 207-08.

III. The Eighth Circuit Erred In Failing To Give Notice To The State Attorney General That It Was Considering Holding A State Statute Preempted.

Finally, the Eighth Circuit erred in invalidating a state law as preempted by federal law without giving notice to the State attorney general as required by Fed. R. App. P. 44(b) and 28 U.S.C. § 2403(b). When the Eighth Circuit was considering invalidating a

state law (based on its own precedents), it should have provided the State attorney general with the opportunity to defend the thirty-year-old state procedure as authorized by federal law and consistent with the Court's precedents.

CONCLUSION

The Eighth Circuit's decision in this case is in conflict with the federal Individuals with Education Act and this Court's precedents. It is a case of nationwide importance that warrants the granting of the Petition for Writ of Certiorari.

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